Supreme Court, U.S.
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No. 95-767

In The
Supreme Court of the United States
October Term, 1995

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL.,
Petitioner,

v.

J. JACK BRAS,
individually, and doing business as
J. JACK BRAS & ASSOCIATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether respondent has standing to challenge a California statute and implementing regulations of the Public Utilities Commission of the State of California ("Commission") that establishes voluntary goals, not quotas, set-asides or preferences, for the procurement of goods and services by public utilities from women and minority business enterprises in public utility procurement programs:

    a) Whether respondent has satisfied the injury-in-fact requirement where respondent failed to demonstrate that the statute and implementing regulations impose a barrier to his placing a bid for an architectural public utility contract; and

    b) Whether respondent has demonstrated a causal nexus between his alleged injury that is fairly traceable to the Commission where the alleged injury results from the independent acts of a third party public utility not before the court.[1]

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[1] The "Questions Presented" recited verbatim as set forth in the Petition are not in fact presented by this case and contain material misstatements of fact.

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondent, J. Jack Bras, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioner Public Utilities Commission of the State of California (hereinafter, "the Commission"). The Petition contains a multitude of misstatements of fact concerning the evidence put before the Court in the proceedings below. In addition, this Court has already resolved the previous conflict among circuit courts regarding Article III standing in equal

protection cases, by its 1993 decision of *Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville,* 508 U.S. ___, 113 S.Ct. 2297 (June 13, 1993) which was determined during the time this case was on appeal to the Ninth Circuit Court of Appeals. Therefore, there is no compelling reason to grant the writ and it should be denied.

STATEMENT OF THE CASE

A. Statement Of The Facts

1. J. Jack Bras suffered a loss of utility business due to the WMBE Statute and General Order 156.

J. Jack Bras (hereinafter, "Bras") is a white male and a licensed architect. ER 54. Since 1969, he continuously provided architectural services to Pacific Bell, a utility regulated by the California Public Utilities Commission and now governed by the WMBE statute and General Order 156. ER 19, 55, App. 62-91.[2]

From 1969 through 1991, Bras provided architectural services to Pacific Bell on a project-by-project basis, upon issuance of a work order pursuant to a succession of three-year contracts. The last three-year contract was issued on June 30, 1989. For the period of 1983 through 1990, revenue generated from the Pacific Bell account approximated 30% of Bras' gross receipts. ER 55, App. 112.

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[2] References to the Excerpt of Record filed with the Ninth Circuit Court of Appeals are designated by ER. References to the Commission's appendix are designated by App.

In February 1991, Bras received a letter from Paula Knapp, Contract Manager at Pacific Bell. The letter requested that Bras submit his response to the enclosed "pre-qualification criteria" form. The letter stated that it was "imperative" that Pacific Bell receive the requested information by February 15, 1991 or "your firm will be disqualified from participating in our corporate long-term plans." ER 55, 114, App. 112, 92.

Bras submitted his response to the "pre-qualification criteria" form with letter dated February 4, 1991. The only negative response made by Bras on that form was that he was not "currently certified through the Cordoba Corporation Clearing House process for Minority/Women Business Enterprise status." ER 55, 114–117, App. 112, 116. (Commission omitted Bras' cover letter, appended hereto by Bras as Resp. App. 1.)[3]

On April 16, 1991, Hugh Anton, an employee architect of J. Jack Bras & Associates, received a phone call from Paula Knapp at Pacific Bell. Ms. Knapp inquired as to the firm's WMBE status and Mr. Anton informed her that J. Jack Bras & Associates was not a WMBE firm. ER 59–60 (not submitted by the Commission) ER 56, App. 113.

In June, 1991, Bras noticed he was not receiving any more assignments from Pacific Bell and complained about the unexplained loss of business to Phil Quigley, President and CEO of Pacific Bell by letter. ER 56, App. 113.

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[3] Since the Commission failed to present certain material evidence in its own appendix to its Petition, Respondent Bras has submitted additional documents in Respondent's Appendix, appended hereto and referred to throughout as "Resp. App."

In response, Bras received a letter signed by Jack Behuresht, Director of Project Management - Real Estate for Pacific Bell "for M.J. Cochrane," explaining that the process used to select architectural firms in the Bay Area included evaluation of the information Bras had submitted in his response to the pre-qualification criteria response letter. Bras was also assured in the letter that "(his) firm was very competitive and not eliminated due to any unsatisfactory performance." ER 56, 119, App. 113, 100.

Bras responded by another letter dated August 19, 1991 questioning whether the selection process used by Pacific Bell was grounded upon racial considerations and whether his firm was eliminated from consideration based upon racial classification. ER 56–57, 121, App. 113, Resp. App. 3.

Thereafter, in September, Pacific Bell representatives provided Bras with a document entitled "Selected Weighting Criteria of 13 Firms" which included notation of nine "attributes" used in evaluating and "ranking" the firms that had responded to the pre-qualification criteria questionnaire form. The listed "attributes" included quality of past performance; central office design experience; administrative space design experience; WMBE status; number of licensed architects; number of years in business; 1990 expenditure; CAD capability and size of organization. All "attributes" listed except WMBE status included a ranking for Bras in that category. As to the "WMBE status" attribute, Bras received no ranking because he was a "non-minority." The attribute description specified that ranking was only (received) by a firm that "meets the official definition of a Minority or Women Owned Business (i.e. at least 51% ownership)." ER 56–57, 124–125, App. 113–114, 97–99. Bras Continued to question Pacific Bell as to its selection

process by his letter dated September 24, 1991. ER 57, App. 114, letter attached in Resp. App. 5–7.

Later, in October 1991, Bras received further correspondence from Jack Behuresht, which admitted that:

> ...(T)he criteria included an indication of a firm's M/WBE status. In 1988 the California Public Utilities Commission adopted General Order 156 regarding utility purchasing from M/WBEs. **That order requires Pacific Bell to set goals for purchasing from M/WBEs of 15% of total purchasing dollars from minority-owned businesses and 5% from women-owned businesses by 1993.**
>
> **Since your firm is not a minority- or woman-owned business, the criterion was "not applicable." It was however, one of the criteria used in the selection process. ...**

ER 57, 126–127, Resp. App. 8–10. (emphasis added)

As it was later revealed, Bras would have been mathematically included in the top three architectural firms selected for further evaluation by Pacific Bell, had it not been for the lack of ranking because he was not a WMBE. ER 61–62, 64. Graphs produced by Pacific Bell during discovery and the deposition of Pacific Bell's Jack Behuresht showed that 10 points were given to those firms who were designated as WMBEs. ER 70, 128–130.[4] However, because Bras could

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[4] Exhibits 128, 129 and 130 were marked "Restricted Confidential" by Pacific Bell and were ordered to be filed under seal pursuant to the terms of a Stipulated Protective Order. The Commission procured a waiver of confidentiality from Pacific Bell regarding the "Pre Qualification

not receive points in the WMBE category, he ranked sixth of the thirteen responding architectural firms and was eliminated from further consideration. ER 68–71, 128–130, 76, (App. 104-107, 110), App. 46, Resp. App. 11–22.[5]

The evidence also showed that in order to meet its "minimum goals" under the General Order 156, Pacific Bell had apparently "loaded up" its architect/interior design category (31%, 24%) with MBEs and WMBEs to balance out categories such as Legal, Financial and Real Estate Services (2.7%, 1.4% and 2.3%) in which less MBEs and WMBEs were utilized. This enabled the utility to meet its overall "goal" while far exceeding it in certain categories, namely, architecture/interior design. ER 110–111, 113 [ER 110, 111 and 113 which are part of Pacific Bell's "M/WBE Annual Report, Plan and Cost Exhibit," February 23, 1990, were not submitted by the Commission].

Accordingly, the burden on non-minority architects and interior designers to compete for utility business appears considerably higher than that placed on non-minority financial, legal or real estate professionals contracting with the same utility. Yet there are no explanations of any reasons for this burdensome imbalance because no statistical analysis was ever presented of the ratio of qualified minority to qualified non-minority contractors or professionals in any

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Criteria" form [ER 130, App. 46] which the Commission has included in its Petition. However, neither of the graphs [ER 128, 129] showing actual application of the "Pre Qualification Criteria" by Pacific Bell were submitted to this court with the Petition. Respondent offers to supply copies of these documents to the Court upon request.

[5] The Commission has chosen to omit certain portions of the deposition transcript pages that were contained within the Excerpt of Record. To avoid unnecessary confusion, Bras has included all of Behuresht's deposition testimony submitted in the record in Resp. App. 11–22.

given category. Nor were any studies or statistical analyses presented to the court that could support such an imbalance in the procurement of minority or women owned contractors/professionals. (See ER 144-147, App. 62-68, WMBE Statute, General Order 156, ER 148-157, App. 69-91 and Defendant's Statement of Material Facts [ER 134-140 not submitted by the Commission].

2. Overview of the WMBE Statute and General Order 156.

In 1986, California enacted a body of law entitled "Women and Minority Business Enterprises" codified in California Public Utilities Code sections 8281 through 8286, (hereinafter, the "WMBE statute").

The stated object of the WMBE statute was to promote full and free competition by aiding the interests of women and minority business enterprises. ER 144–145. California Pub. Util. Code § 8281, App. 62-64. The statute sought to assure that a proportion of contracts and purchases made by utilities with gross annual revenues exceeding twenty-five million dollars ($25,000,000.) would be awarded to men and minority business enterprises defined therein as Black Americans, Hispanic Americans, Native Americans and Asian Pacific Americans. Disabled veteran business enterprises also came under the protection of the statute. ER 146. California Pub. Util. Code § 8283, App. 65-66.

General Order 156 was promulgated by the Commission to implement the WMBE statute. ER 90-108, App. 69-91. The Commission was also given oversight responsibility over the programs the individual utilities utilized to reach their "goals." ER 146. California Pub. Util. Code § 8283, App. 65-67.

The Order specifically directs that "each utility shall establish initial minimum long-term goals for each major category of products and services the utility purchases from outside vendors of not less than 15% for minority owned business enterprises and not less than 5% for women owned business enterprises." General Order 156, § 8.2, ER 154, App. 85.

In addition, the General Order required utilities such as Pacific Bell to submit annual reports to the Commission in accordance with the WMBE Statute and General Order 156 concerning the achievement of those "goals." ER 5, 6, 19, 105–106, General Order 156, §§ 9, 10, App. 53-54 [ER 19 not submitted by the Commission], 88-91.

Both the WMBE statute and General Order 156 are noticeably void of any participation or protection for competing non-minority enterprises. ER 96-103, General Order 156 §§ 5.1, 6.2, 6.3, 7, App. 78-84. For example, under the auspices of the WMBE Statute and General Order 156, it would be acceptable for the utility to contract/purchase from only minorities (or women), or to "load up" in one category to meet its target limits in another, as was alleged of the actions by Pacific Bell. ER 6–7, 104, General Order 156 §§ 8.7, 8.8, App. 53-54, 87.

Under the statutory scheme as implemented by General Order 156, a non-minority businessman is without any meaningful method of requesting relief from application of the statute or order, or for any other individualized or special consideration. ER 99, 103–104, 106, App. 82, 86-87, 89. Nor is he allowed to participate in the "Complaint Process" set forth in General Order 156 § 7, which is only open to

WMDVBEs and "potential" WMDVBEs. General Order 156 § 7.1, ER 99, App. 82.

Indeed, it appears that the non-minority enterprise is not even privy to the same type or quality of information that is available to the WMDVBEs, such as information concerning the particular method of goal setting by the individual utilities under the WMBE statute and General Order 156 or the areas in which the enterprise would have the "best opportunity for success." See General Order 156 § 6.2.1(3)(4)(5)(6), § 8.11, § 9.1.8, ER 97, 105, 106, 109, 112, App. 80-81, 89.

No evidence has been produced of any study conducted by the State of California, the California Public Utilities Commission or any particular utility governed by the WMBE statute or General Order 156 to ascertain the ratio of qualified minority enterprises to qualified non-minority enterprises in any category, in the geographical region subject to the statute or General Order 156. Indeed, the Commission requested information regarding whether such a study should be conducted in its Order Instituting Rulemaking, R.93-09-026, filed within days of the filing of Bras' opening appellate brief to the Ninth Circuit (appended to the Bras' Reply brief with a request for judicial notice, not opposed by the Commission). Resp. App. 23-45. Nor is there anything in the statute or General Order evidencing any intent of the legislature or the California Public Utilities Commission to enact and implement such law in favor of Women, Minorities and Disabled Veterans as a remedial measure for past discrimination. Moreover, there is no evidence of any study undertaken to satisfy the requirements of the *Croson* criteria set forth by the United States Supreme Court which apply to the race conscious preferences or "set-asides" contained in

the WMBE statute and California Public Utilities Commission General Order 156. Plaintiff's and defendant's respective statements of material undisputed facts, submitted on the cross-motions for summary judgment ER 49-53, 134-180 [not submitted by the Commission], and written statements in the Commission's brief to the Ninth Circuit and contained within its own Order Instituting Rulemaking, R.93-09-026, Resp. App.23-45. See also the subsequent "Interim Opinion" in that proceeding, dated August 3, 1994 of which judicial notice was also requested and unopposed. Resp. App. 46–65.

Accordingly, appellant, a non-minority white male, requested a declaratory judgment that the WMBE Statute and General Order 156 deny him Equal Protection under the laws and are therefore violative of the 14th Amendment to the United States Constitution, both on their face, and as applied since he has been and is still prevented from competing for utility contracts on an equal footing with minority architects under the statutory scheme.

Bras' claims included specific allegations and submission of proof concerning the loss of a particular contracting relationship **and** the strong **probability** that he will suffer future injury if the WMBE Statute and General Order 156 are not abrogated or enjoined.

3. Bras showed that there is a strong probability of future injury if the WMBE statute and General Order 156 are not abrogated or enjoined.

Bras showed that he had a history of successive three-year contracts with Pacific Bell for the performance of architectural services In addition, despite his elimination

from consideration (in 1991) detailed above, he "earnestly desire(s) to reinstate (his) long-term business relationship with Pacific Bell"...and stand(s) ready, willing and able to provide such services should (he) be given an opportunity to do so. ER 57, App. 114.

In addition, Bras received two separate letters from Pacific Bell which reiterated that it was satisfied with the services Bras had provided to it and that Pacific Bell would keep Bras' information in its files and "will be happy to consider Bras and Associates when (its) contract for architectural services is reevaluated in the future. ER 119, 126-127, App. 100-101, Resp. App. 8.

As the Ninth Circuit pointed out, there is no evidence on the record indicating that the settlement with Pacific Bell in any way prevents Bras from competing for future contracts. *Bras v. California Public Utilities Commission*, 59 F.3d 874 (9th Cir. 1995), App. 13. Indeed, the Bras' declaration stating his future intentions was submitted after his settlement with Pacific Bell. Accordingly, Bras has shown a strong probability that future injury will occur if the Statute and Order are not enjoined.

B. Proceedings Below

1. The Ninth Circuit Court of Appeals correctly reviewed, de novo, the Summary Judgment of the District Court.

The grant of summary judgment by a district court is appropriately reviewed de novo by the Ninth Circuit Court of Appeals. *First Pacific Bank v. Gilleran*, 40 F.3d, 1023, 1024 (9th Cir. 1994). The duty of the Appeals Court is to

determine whether, in viewing the evidence in the light most favorable to the non-moving party, there was a genuine issue of material fact for trial and whether the District Court correctly applied the law. *Id.* (as cited in *Bras v. California Public Utilities Commission*, 59 F.3d, 869, 872 (1995), the underlying decision of the Ninth Circuit to which the Commission's Petition for a Writ of Certiorari has been brought.)

2. The Issue on Appeal was whether Bras had Article III Standing to continue his Equal Protection Challenge to the WMBE Statute and the Commission's General Order 156.

The District Court granted the Motion for Summary Judgment brought by the Commission on the basis that Bras lacked standing. The District Court held that Bras lacked standing to pursue his claims for declaratory and injunctive relief after the settlement of his damages claims against Pacific Bell. ER 253, App. 39.

There are three requirements for Article III standing. First, plaintiff must have suffered an "injury-in-fact," which means an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not "conjectural" or "hypothetical." Secondly, there must be a causal connection between the injury and the conduct complained of—meaning that the injury is fairly traceable to the challenged conduct and not the result of the independent action of a third party not before the court. Lastly, it must be likely, as opposed to merely "speculative" that the injury will be redressed by a favorable decision (citations omitted). *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992).

3. The Commission and District Court relied upon the Standing Test then advocated by the Eleventh Circuit which was overruled by this Supreme Court during the pendency of the *Bras* appeal.

The District Court relied upon Eleventh Circuit precedents, including the case of *Cone Corp. v. Florida Dep't of Transp.*, 921, F.2d 1190 (11th Cir. 1991), and found that Bras failed to meet the "injury-in-fact" requirement of Article III standing because he had not proven the loss of future business as a result of the WMBE Statute or General Order 156 and had not shown that "but for" the Statute or Order, Bras would have been awarded a contract. ER 250-255, App. 36-41.

Generally, prior to this Court's decision of *Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. ___, 113 S.Ct. 2297 (June 13, 1993) (*"Northeastern Fla."*), a split of authority existed between the Eleventh Circuit and decisions of the District of Columbia and Ninth Circuit respecting interpretation of the injury requirement component of Article III standing in equal protection cases. The Eleventh Circuit cases required plaintiff to show loss of a specific contract in order to prove standing. *See* discussion in *Northeastern Fla.*, at p. 2300, 2302.

In *Northeastern Fla.*, decided by this Court during the time the *Bras v. California Public Utilities Commission* case was on appeal, this Court held that it was not necessary to show that a contract would have been received "but for" the challenged ordinance in order for a person or entity to have standing to seek declaratory and injunctive relief:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury-in-fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier not the ultimate inability to obtain the benefit.

Northeastern Fla. at p. 2303.

In *Northeastern Fla.*, this Court reversed the decision of the Eleventh Circuit which had ordered dismissal of plaintiff's claims. The Supreme Court held that the association of contractors in that action had standing to challenge an ordinance that gave preferential treatment to certain minority-owned businesses.[6] There, the Association had not referred to any specific contract or a bid that was lost—only that its members regularly bid on contracts and they would have bid on contracts but for the restrictions of the ordinance.

Here, there was uncontradicted evidence that "but for" the 10 point preference given to architect WMBEs by Pacific

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[6] In fact, the original ordinance challenged by the Association plaintiff in *Northeastern Fla.* consisted of a set-aside of 10% of total dollars spent on city contracts in favor of women and seven different minority groups. That ordinance was repealed 22 days after the Supreme Court granted certiorari. Nonetheless, this Court found that plaintiff had standing to continue its challenge against the new ordinance. *See Northeastern Fla.*, 2300–2301.

Bell, Bras would not have been eliminated from consideration for entering into an "improved business partnership" with Pacific Bell. ER 126-130, 63-77, App. 46, App. 102-110 and Resp. App ___. (ER 128, 129 graphs not submitted with the Commission's Petition.) In addition, Bras' Declaration in Opposition to Summary Judgment which was made subsequent to his settlement with Pacific Bell, stated that:

> I earnestly desire to reinstate my long-term business relationship with Pacific Bell in the performance of architectural services to it in the future and stand ready, willing and able to provide such services should I be given an opportunity to do so.

(ER 57, App. 114.)

The Ninth Circuit Court of Appeals found that such declaration, along with a letters from Pacific Bell reiterating its pleasure with Bras' work and its intention to keep his information in their files for future consideration, was sufficient for purposes of summary judgment to show Bras would suffer future injury if the program was not enjoined. *See Bras v. California Public Utilities Commission, 59 F.3d at 874*, App. 12.

REASONS THAT THE PETITION SHOULD BE DENIED

A. The Previous Split Of Authority Between The Circuits Regarding The Test For Standing In Equal Protection Actions Has Already Been Resolved By This Court By Its 1993 *Northeastern Fla.* Decision.

As set forth above, this Court's opinion in *Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. ___, 113 S.Ct. 2297 resolved a previous split of authority between the Eleventh Circuit and Ninth Circuit as to the "injury-in-fact" required for Article III standing in equal protection cases. The opinion by this Court in *Northeastern Fla.* upheld the standards recognized by the Ninth Circuit Court of Appeals in *Coral Constr. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991) *cert. denied*, 502 U.S. 1033 (1992), and the District of Columbia in *O'Donnell Constr. Co. v. District of Columbia*, 295 U.S. App. D.C. 317 and reversed the Eleventh Circuit's test which found standing lacking for failure of plaintiff to allege that it would have received a contract but for the challenged ordinance. The Supreme Court's opinion in *Northeastern Fla.* was rendered on June 14, 1993 during the pendency of the appeal by Bras in the Ninth Circuit.

In fact, the Ninth Circuit's opinion in *Bras v. California Public Utilities Commission, 59 F.3d. 869* relied heavily on the resolution of the standing requirement set forth by this Court in *Northeastern Fla.* (*see* App. 11, App. 13–14, App. 15). The Ninth Circuit held that:

> Under *Northeastern Fla.*, Bras need only demonstrate that he is "able and ready" to bid on contracts and that a discriminatory policy

> prevents (him) from doing so on an equal basis.

Bras v. California Public Utilities Commission, 59 F.3d at 873 citing to *Northeastern Fla.* App. 11.

B. The Ninth Circuit Did Not Err In Its Limited Examination Of The Merits Of Bras' Claims In Order To Determine If Standing Existed.

The Commission argues that the Ninth Circuit exceeded its jurisdiction when it addressed the merits of Bras' claims. *See* Petitioner's Brief, (hereinafter referred to as "Pet. Brf.") p. 18. However, the Commission offers no legal authority whatsoever that an examination of the challenged WMBE Statute and the Commission's General Order 156 is inappropriate. Indeed, such a contention is absurd.

The question of whether a party has demonstrated a sufficient injury to litigate a constitutional claim necessarily involves a limited inquiry into the merits of plaintiff's claim to determine if the injury plaintiff asserts might stem from a violation of the constitutional guarantee. *Warth v. Seldin*, 422 U.S. 490, 500, 501 (1975).

As this Court's review of standing undertaken in *Northeastern Fla.* shows, it is necessary to review the facts and provisions of the particular ordinances or programs at issue in order to determine if plaintiff has alleged an injury that can be fairly "traceable" to the challenged action—the second requirement of Article III standing. *See, Northeastern Fla.*, 508 U.S. ___, 113 S.Ct. at 2301–2304; *Lujan v. Defenders of Wildlife*, 505 U.S. 555, 112 S.Ct. at 213–2136..

C. The Petition Improperly Contests The Factual Findings Of The Ninth Circuit, Which Court Was Required On Review Of Summary Judgment, To View The Evidence In The Light Most Favorable To Bras.

The Commission's petition consists almost entirely of protestations about the factual findings of the Ninth Circuit Court of Appeals. Certiorari is rarely granted for such asserted error(s). *See* Rules of the Supreme Court of the United States, adopted July 26, 1995, and effective October 2, 1995, Rule 10.

In addition, the Commission blatantly ignores the fact that the Ninth Circuit was required to review the evidence presented in the Bras appeal of a district court's summary judgment, in the light most favorable to Bras, the non-moving party. *See Bras v. California Public Utilities Commission*, 59 F.3d at 872, App. 8, citing to *First Pacific Bank v. Gilleran*, 40 F.3d 1023, 1024 (9th Cir. 1994). Therefore, findings of fact by the Ninth Circuit favorable to the evidence presented by Bras are not properly subjected to review by this Court on a petition for writ of certiorari.

D. There Is A Sufficient Causal Nexus Between The WMBE Statute, The Commission's General Order 156 And Bras' Past And Threatened Future Injury.

Since the provisions of both the WMBE Statute and the Commission's General Order are **mandatory** for all regulated utilities whose gross annual revenues exceed $25,000,000, a sufficient nexus has been established showing that the Statute and Order directly caused and will continue to cause Bras injury.

The case of *Lujan v. Defenders of Wildlife*, 504 U.S. 555, (1992) does not defeat Bras' claim of standing because he has suffered a particularized injury that can effectively be redressed by a judicial decision. In this case, an order granting injunctive or declaratory relief to enjoin or abrogate the WMBE Statute and General Order 156 would provide immediate redress to Bras, as the utilities would no longer be bound to comply with the provisions of the Statute and Order requiring them to implement numerical "goals" for WMBEs in their selection of contractors and suppliers. Bras also alleged and proved he suffered a direct injury by the utilities implementation of the Commission's General Order 156 showing that this Court's previous decision in *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, [38–40], 44–45 (1976) also does not act to defeat Bras' standing to challenge the Commission's Order and the WMBE Statute. In addition, the Commission's proffered case of *Asarco v. Kadish*, 490 U.S. 605 (1989) is readily distinguishable. The Bras case is not a "taxpayer case."

Here, Bras has shown direct injury both past and threatened, caused by the provisions of the WMBE Statute and General Order 156 which compel the utilities to seek the minimum numerical "goals" for WMBE procurement as set by the Commission and conducted under its "oversight" responsibilities. (*See* Cal. Pub. Util. Code § 8283, App. 65–66 and General Order 156, §§ 1.1.1, 6.1, 8,9,10,11, App. 73, 79, 85–91.) In fact, the Commission even requires the utilities to evaluate its "employees with procurement responsibilities" "on the basis of their progress in meeting the goals of their specific area of procurement"! (General Order 156, §6.1.1, App. 79.) Accordingly, the nexus between Bras' injury and the WMBE Statute and Commission's General

Order 156 as imposed on the utilities is sufficient for purposes of Article III standing in this equal protection case.

E. The Petition Is Riddled With Misstatements Of The Facts And Evidence Before The Court.

Pursuant to Rules of the Supreme Court of the United States, adopted July 26, 1995, and effective October 2, 1995, Rule 15(2), a brief in opposition is required to address any perceived misstatement of fact or law. In this case, respondent Bras must report that the Commission's petition is riddled with several misstatements of the facts and evidence put before the court.

1. No "Bidding" was involved in the selection process at issue in the *Bras* Case.

In the "Questions Presented" portion of the Commission's petition, the Commission states that one of the questions presented by the *Bras v. California Public Utilities Commission* case is whether respondent has satisfied the injury-in-fact requirement "where respondent failed to demonstrate that the statute and implementing regulations impose a barrier to his placing a bid for an architectural public utility contract; ..." (Pet. Brf. p. i(1)(a).) However, the selection process involved in this case and the percentage WMBE "goals" for total procurement of utility contracting and service dollars set by General Order 156 do not necessarily involve a "bidding" process.

The Commission's argument that "the crux of Bras' claim is not that he did not have an equal opportunity to bid, but that he did not win a bid" (Pet. Brf. at p. 17) and its reference to (Pacific Bell's) Mr. Behuresht's alleged

deposition testimony "that even if the WMBE factor had been eliminated, Bras may not have won a bid" (Pet. Brf. at p. 17, fn. 7), is contradicted by the actual testimony submitted."

Even a cursory review of the deposition testimony of Mr. Behuresht, a portion of which is included in the Commission's appendix at App. 102–110, shows that the word "bid" was never used at all by Mr. Behuresht.

Rather, in this case, Bras was eliminated from consideration for selection by Pacific Bell from the potential of entering into an "improved business partnership" with the utility. ER 54–57, 63–77, App. 112–115 and Resp. App. 12–22. Bras is not able to allege that he "bids" on particular projects for Pacific Bell, but that for a period of over 20 years, he had regularly obtained contracts with Pacific Bell on a three-year period for performance of architectural work, (ER 55, App. 112.) and that he desired to provide services to Pacific Bell in the future and stood "ready, willing and able" to do so if given the opportunity. *See*, Bras Declaration, ER 55–57, App. 112–114.

The Ninth Circuit Court of Appeals found that despite the fact Bras could not (then) "bid" on future projects for Pacific Bell because Pacific Bell had already entered into long-term business relationships with the three other architects who had the most points on the Pacific Bell selection matrix (ER 128–129.) "Bras can, however, fill out a new qualification form when the three-year term of Pacific Bell's present business relationships expires." *Bras v. California Public Utilities Commission*, 59 F.3d at 873 (App. 11.) The Ninth Circuit expressly found that the fact that "Bras can only compete for long-term contracts every several years rather than on a

project-by-project basis does not change the (standing) analysis." *Bras v. California Public Utilities Commission*, 59 F.3d. at 873 (App. 11.) Indeed, to find otherwise would entirely prevent all persons who seek contractual relationships with the utilities which do not involve a "bidding" process from challenging the WMBE statute and General Order 156.

2. The Commission Materially Misstates The Provisions Of The Challenged Statute And Order.

In its petition, the Commission has even made material misstatements about the content of the challenged WMBE statute and its General Order 156. The WMBE statute and General Order 156 actually **require** the regulated utilities to set minimum WMBE procurement "goals" and submit reports concerning its progress in achieving its "goals" to the commission pursuant to the WMBE Statute and the Commission's General Order 156:

> (a) The commission shall require each electrical, gas, and telephone corporation with gross annual revenues exceeding twenty-five million dollars ($25,000,000) and their Commission-regulated subsidiaries and affiliates, to submit annually, a detailed and verifiable plan for increasing women, minority and disabled veteran business enterprise procurement in all categories.
>
> (b) These annual plans shall include short- and long-term goals and timetables, but not quotas, and shall include methods for encouraging both prime contractors and

grantees to engage woman, minority, and disabled veteran business enterprises in subcontracts in all categories which provide subcontracting opportunities.

(c) The commission shall establish guidelines for all electrical, gas, and telephone corporations with gross annual revenues exceeding twenty-five million dollars ($25,000,000) ... to be utilized in establishing programs pursuant to this article.

(d) Every electrical, gas, and telephone corporation with gross annual revenues exceeding twenty-five million dollars ($25,000,000) shall furnish an annual report to the Commission regarding the implementation of programs established pursuant to this article ...

(e) The commission shall provide a report to the Legislature on September 1 of each year, on the progress of activities undertaken by each electrical, gas and telephone corporation with gross annual revenues exceeding twenty-five million dollars ($25,000,000) pursuant to this article and the implementation of woman, minority, and disabled veteran business enterprise development programs. ... California Public Utility Code Section 8283(a-e), App. 65–66.

The Commission's General Order 156 actually sets the numerical "goals" that are to be utilized by the utilities:

> 8. GOALS
>
> Each utility shall annually set substantial and verifiable short-term (one-year), mid-term (three-years) and long-term (five years) goals for utilization of WMBEs. Goals shall be set annually for each major product and service category which provides opportunities for procurement. "Substantial goals" means goals that are realistic and clearly demonstrate a utility's commitment to increase WMDVBE's share of the utility's purchases and contracts.
>
> ...
>
> 8.2 Each utility shall establish initial minimum long-term goals for each major category of products and services the utility purchases from outside vendors of not less than 15% for minority owned business enterprises and not less than 5% for woman-owned business enterprises.
>
> ...
>
> 8.3 The specification of initial long-term goals in this section shall not prevent the utilities from seeking to reach parity with public agencies, which the Legislature found in Public Utilities Code Section 8281(b)(1)(B) are awarding 30% or more of their contracts to WMBEs.
>
> ...
>
> 8.8 Overall program goals shall be expressed as a percentage of total dollars

> awarded to outside vendors in all categories of products and services purchased by a utility other than products and services which fall within an excluded category established by the utility pursuant to Section 8.5, or which are included in a fuel procurement base established pursuant to Section 8.10.
>
> ...
>
> 8.12 Except for any penalty imposed as a result of a Commission-initiated investigation, no penalty shall be imposed for failure of any utility to meet and/or exceed goals.

General Order 156, App. 85–89.

As can be seen by a review of the WMBE statute (App. 62–68)and the Commission's General Order 156 (App. 69–91), which utilizes the words "shall," "at least," and "not less than" in the provisions advising the utilities of the numerical "goals" set by General Order 156 in implementing the WMBE statute, there is nothing voluntary about either the statute or the order. Even the Commission's own footnote (Pet. Brf. p. 2, fn. 2) admits that (prior to implementation of annual generic review proceedings), a utility's WMBE program was reviewed in its rate setting proceedings. In addition, based upon the Commission's brief and oral argument before the Ninth Circuit, the Ninth Circuit found that "the Commission concedes that it could sanction a utility by reducing its rate of return." *Bras v. California Public Utilities Commission*, 59 F.3d. at 872 (App. 8). Furthermore, the clear language of the Commission's General Order at section 8.12, shows that "although a utility cannot be automatically be sanctioned solely for failing to meet

goals, the Commission may, after conducting an investigation, sanction a utility for failing to make acceptable progress in the hiring of minority businesses." *Bras v. California Public Utilities Commission*, 59 F.3d. at 872 (App. 8), citing to General Order section 8.12.

3. The Petition refers to only a part of the evidence relied upon by the Ninth Circuit and fails to supply material evidence in its appendix.

However, the evidence provided by Bras in opposition to the Commission's summary judgment motion included much more material evidence than is produced in the Commission's appendix to its Petition. The Commission has not advised this Court that there were two letters from Pacific Bell that expressed Pacific Bell's satisfaction with Bras' previous work and which stated its intention to keep Bras' information in its files for future consideration. The first letter, dated July 26, 1991 is appended to the Commission's appendix as A-100. In that letter signed by Mr. Behuresht on behalf of M.J. Cochrane, Pacific Bell advises Bras that "I would like to assure you that your firm was very competitive and was not eliminated due to any unsatisfactory performance." (ER 119, App. 100, referenced in the Ninth Circuit's Opinion at App. 6.) However, the Commission has failed to append a copy of Mr. Behuresht's subsequent letter dated October 16, 1991 to Mr. Bras which was included within the evidence Bras submitted to the District Court, and in which Mr. Behuresht referred specifically to the requirements of the WMBE statute and General Order as it affected Pacific Bell:

> "as you noted in your letter, the criteria included an indication of a firm's M/WMBE status. In 1988, the California Public Utilities Commission adopted General Order 156 regarding utility purchasing from M/WBEs. **That order requires Pacific Bell to set goals for purchasing from M/WBEs of 15% of total purchasing dollars from minority-owned businesses and 5% from woman-owned businesses by 1993.**
>
> **Since your firm is not a minority- or woman-owned business, the criterion was "not applicable." It was, however, one of the criteria used in the selection process.** We ranked each firm with respect to the other criteria. However, since M/WBE status is either a yes or no question, we did not rank the firms in that area.
>
> As stated in Mr. Cochrane's July 26, 1991, letter, J. Jack Bras and Associates has provided valuable services to Pacific Bell in the past and was not eliminated due to any unsatisfactory performance. We appreciate your interest and will maintain your information on file for any future re-evaluation of our need for architectural services."

(ER 126–127, (emphasis added) Resp. App. 8.) However, as discovered by a review of Pacific Bell's "Supplier Pre-Qualification and Selection Weighting Criteria" (ER 130, App. 46), and two graphs of architect rankings not submitted

by the Commission in its appendix, ER 128–129, Bras was eliminated from consideration by Pacific Bell because he was unable to obtain the 10 points for the WMBE status. He therefore placed sixth in Pacific Bell's matrix rather than third as he would have been placed had no points been given for WMBE status. ER 128, 129. *See also* discussion by the Ninth Circuit of the evidence presented to it on the issue, *Bras v. California Public Utilities Commission*, 49 F.3d, at 871, 873–874, App. 5–6, 11–13, and Jack Behuresht's deposition testimony ER 63–77, Resp. App. 11–22.

Equally important, the Commission argues before this Court that the Ninth Circuit made erroneous presumptions regarding the WMBE statute, its General Order 156 and the implementation of the Order by the regulated utilities. However, the Commission fails to recognize that the Ninth Circuit was presented with the Commission's own orders interpreting General Order 156. (*See*, "Order Instituting Rulemaking," R.93-09-026 filed on September 17, 1993 and the Commission's own "Interim Opinion" dated August 3, 1994, of which Bras had requested the Ninth Circuit to take judicial notice and to which no opposition by the Commission was made.) (Supplied for this Court's reference as Resp. App. 23–45, and Resp. App. 46-65.)

CONCLUSION

In light of the foregoing facts and legal argument put before this Court, Respondent respectfully requests that the Court deny the Commission's Petition for Writ of Certiorari.

Respectfully submitted,

PAMELA A. LEWIS
Counsel of Record
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PROFESSIONAL CORPORATION
1676 N. California Blvd., Suite 200
Walnut Creek, California 94596
(510) 937-3600

No. 95-767

In The

Supreme Court of the United States

October Term, 1995

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL.,

Petitioner,

v.

J. JACK BRAS, individually, and doing business as J. JACK BRAS & ASSOCIATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S APPENDIX

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LETTERHEAD OF J. JACK BRAS AND ASSOCIATES ARCHITECTS

February 4, 1991

Paula S. Knapp
Pacific Bell
2600 Camino Ramon, Room 3 E 200
San Ramon, Ca. 94583

SUBJECT: PRE-QUALIFICATION CRITERIA

Dear Ms. Knapp:

It is our pleasure to submit the enclosed Pre-Qualification Criteria form to you as requested.

We have provided professional architectural services to Pacific Bell since 1969, during which time we have successfully completed numerous projects ranging from equipment buildings to offices.

Our projects for Pacific Bell have always been done in a professional manner, completed on time, and within budget.

We hope that our past record speaks for itself, and we sincerely hope that you will continue to consider us as Architectural Consultants. We look forward to a continuing professional relationship with Pacific Bell.

Sincerely,

/s/ J. Jack Bras

J. Jack Bras

JJB:tt

Enc: Pre-Qualification Criteria form
Income Statement and Balance Sheet

LETTERHEAD OF J. JACK BRAS
AND ASSOCIATES ARCHITECTS

August 19, 1991

Mr. Jack Behuresht
Pacific Bell
2600 Camino Ramon, Room 3E001
San Ramon, Ca. 94583

Subject: Architectural Services

Dear Mr. Behuresht:

I appreciate your response to our letter of June 28, 1991 to Mr. Quigley.

I am pleased to know that Pacific Bell continues to recognize that my rates are very competitive and that my firm was not eliminated on the basis of unsatisfactory performance. However even such assurances does nothing but to deepen the mystery as to the criteria used in your process of reducing the number of architectural firms with whom Pacific Bell will do business. I would like to assume that such criteria is objective in nature. Since my firm has had no contact with anyone at Pacific Bell pertaining to your selection process, except for a single telephone call concerning our minority status, I can't help but believe that the "selection process" is fundamentally grounded upon racial considerations. This firm has never conducted its affairs in a racially discriminatory manner and we strenuously object to being removed from future consideration on the basis of an ethnic issue.

Lest I jump to an erroneous conclusion and in view of our long and successful relationship with Pacific Bell, I would appreciate meeting with your contracting managers. Would you also attend? I would dare to hope that, contrary to your letter, a final decision to eliminate me from further services at this time can be deferred pending our meeting and further evaluation.

Sincerely,

/s/ J. Jack Bras

J. Jack Bras

JJB:ha

cc: Phil Quigley
M.J. Cochrane

LETTERHEAD OF J. JACK BRAS AND ASSOCIATES ARCHITECTS

September 24, 1991

Mr. Jack Behuresht
Pacific Bell
2600 Camino Ramon, Room 3E001
San Ramon, Ca. 94583

RE: Architectural Services

Dear Mr. Behuresht:

Both Hugh Anton and myself want to follow-up and thank you for the opportunity of meeting with you, John Couch and Paula Knapp at your office on September 10, 1991. I am not sure what we really accomplished at that meeting although you did hand to me a two page document entitled "Selective Weighting Criteria of 13 Firms." Not having had a chance to review this during the course of the meeting, I thought I would take this opportunity to respond to the document as it purports to represent objective criteria in the selection of architects who would continue to perform services for Pacific Bell.

One of the threshold questions I have has to do with the identity of those individuals within Pacific Bell who did the ranking. I feel that only those with whom I have worked over the years should be judging my firm and I am not sure that

was the case here. Further, at our recent meeting I had some question as to how that criteria entitled "Quality of Past Performance" was really evaluated. At that time you refused to provide any information on this subject stating that was an "internal" process which would not be disclosed. I ask that you reconsider this position and advise me accordingly as to both questions.

I also have some question concerning the relevancy of several criteria such as the number of licensed architects in the firm, size of the organization and a rather narrow category entitled "1990 Expenditures." It seems to me that what matters here is performance, reliability and ability to work with other consultants as well as Pacific Bell field managers. In all these categories I feel I should rank very high.

An anomaly set forth in this document is a criteria entitled "MWBE Status" which apparently has to do with whether "any firm . . . . meets the official definition of a minority or woman owned business (i.e., at least 51% ownership)." That category is then labeled "not applicable." If that is the case why have the criteria listed at all. It leads me to conclude that while it may not be an official criteria it has nonetheless been utilized in the selection process.

I have been advised by counsel that reverse discrimination (e.g., racial discrimination against whites) is just as actionable under our various state and federal statutes as

racial discrimination against blacks, hispanics or any other racial group. It seems to me that you may be considering racial guidelines or some affirmative action program in making your selections. I have no objection to that as long as it is a lawful process. I am not sure what the PUC requires but that can be ascertained.

What I would expect from Pacific Bell is fair treatment. You said at the close of our meeting that you would get back to me. I eagerly await your response in that respect.

Very truly yours,

/s/ J. Jack Bras

J. Jack Bras
JJB/sn
cc: Phil Quigley
M.J. Cochrane

LETTERHEAD OF PACIFIC BELL

By Fax - Oct. 23, 1991
Hard copy in mail today to Mr. Bras

October 23, 1991

Mr. J. Jack Bras
J. Jack Bras and Associates
90 Mission Drive
Pleasanton, CA 94566

Plif	ExH 28
WITNESS	
DATE	10-15-92

Dear Mr. Bras:

Thank you for your letter dated September 24, 1991. As we agreed at our September 10th meeting, I have reviewed our recent selection process for architects. The package, entitled "Selected Weighting Criteria of 13 Firms", which we provided to you at our meeting lists and describes the criteria utilized by Pacific Bell to evaluate the competing firms. I am satisfied that our evaluation of the various firms based on these criteria was conducted in a fair and consistent manner. Let me reiterate our previous assurances that there was no intent to imply poor performance on the part of your firm. The group of competing firms included only those firms which have provided a high level of service to Pacific Bell. Given that fact, it was unavoidable that some very competent firms would not be ranked as high as others.

With respect to your concerns regarding the process utilized to evaluate the first criterion, "Quality of Past Performance", we asked our project managers to rate your firm's work over the past two years in the areas of cost, timeliness of performance, quality of performance, process and interaction. Only those Pacific Bell managers who have worked with your firm during that two-year period provided input. Those managers included Jose Albano, Mark Johnson, Anton Lonich, Lowell Marcus and Becky Smith.

As we discussed, the greatest weight was given to past performance, as indicated by its placement at the head of our criteria list. There were, however, other important criteria that did receive consideration. The number of licensed architects and the size of organization were considered in order to ensure that the firm could absorb what is anticipated to be an increased amount of business in some cases. I believe that the selected firms evidence the fact that smaller size did not place any firm at a great disadvantage. The category of "1990 Expenditures" was another area of consideration. The amount of work we awarded to any firm in the last two years is another indicator of the faith our field managers have in that firm.

As you noted in your letter, the criteria included an indication of a firm's M/WBE status. In 1988 the California Public Utilities Commission adopted General Order 156 regarding utility purchasing from M/WBEs. That Order requires Pacific Bell to set goals for purchasing from M/WBEs of 15% of

total purchasing dollars from minority-owned businesses and 5% from women-owned business by 1993.

Since your firm is not a minority- or woman-owned business, the criterion was "not applicable." It was, however, one of the criteria used in the selection process. We ranked each firm with respect to the other criteria. However, since M/WBE status is either a yes or no question, we did not rank the firms in that area.

As stated in Mr. Cochrane's July 26, 1991 letter, J. Jack Bras and Associates has provided valuable services to Pacific Bell in the past and was not eliminated due to any unsatisfactory performance. We appreciate your interest and will maintain your information on file for any future reevaluation of our need for architectural services.

Sincerely,

/s/ Jack Behuresht

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

J. JACK BRAS, individually and doing business as J. JACK BRAS & ASSOCIATES,

Plaintiff,

vs.

PACIFIC BELL, a Corporation, CALIFORNIA PUBLIC UTILITIES COMMISSION, PHILIP BREMOND in his representative capacity as MWDVBE Program Manager for the California Public Utilities Commission, NEAL SHULMAN in his representative capacity as Executive Director of the California Public Utilities Commission,

Defendants.

_____/

CONTINUED DEPOSITION OF JACK BEHURESHT

VOLUME II

Taken before DOREEN L. COVARELLI,

a Certified Shorthand Reporter

State of California

CSR No. 8039

October 16, 1992

Are you referring to the 13 firms?

MR. BERG: The 13 firms shown on that one matrix? We're looking at -- this is an exhibit here.

MR. GARVIN: On the 13 firms on the survey. Yes, it would be on that.

MR. BERG: Okay.

THE WITNESS: Primarily, yes. And the reason I will not limit it to 13 is because some firms maybe were invited, but did not participate, but fundamentally, the 13.

MR. GARVIN: Q. How did you determine that these 13 -- for the sake of our subject matter -- that all 13 firms had previously provided a high level of service to Pacific Bell?

A. Basically, the rating of field people and the fact that they were doing business with us. Typically, if the performance is not satisfactory, we cease to do business with the firm.

Q. So you made that determination by input, I guess, from your field people primarily?

A. Primarily.

Q. Did you make any independent determination? In other words, determination on your own apart from your input from the field people that these were good, quality firms?

A. Did I personally make?

Q. Yes.

A. No, I did not.

Q. Now, you yourself, I believe, testified that you knew personally only, I think, two firms?

A. That's correct.

Q. And that's Intergraph?

A. And Garcia/Wagner.

Q. And Garcia/Wagner. And so independent of that field input, did you just on your personal experience, did you conclude that at least those two were good, quality architectural firms?

A. I knew that they were good quality architectural firms.

Q. Now, you also concluded or assured Mr. Bras in that letter in the last paragraph page 2 of that letter, which is Exhibit 25 -- excuse me. Exhibit 28.

MR. BERG: Where, second page?

MR. GARVIN: Page 2, yeah, last page, last paragraph.

Q. You also assured Mr. Bras that he was not eliminated due to any unsatisfactory performance and my question is, did you draw that conclusion from looking at what counsel -- your counsel has referred to as the matrix or how did you arrive at that conclusion?

MR. BERG: Call it by exhibit name since we got it here.

MR. GARVIN: 12.

MR. BERG: Exhibit 12.

MR. GARVIN: Q. In other words, my broader question is how did you make that determination that Mr. Bras wasn't eliminated due to any unsatisfactory performance?

A. From the field input which was reflected on the matrix.

Q. In addition to the matrix, we have as part of -- in addition to the matrix, we have an Exhibit 16 through 24 -- Exhibit 16 through 23 what appear to be field input and I take it you did not rely on that in drawing your conclusion as to Mr. Bras?

MR. BERG: These pages (indicating).

THE WITNESS: I have not seen these pages before.

MR. GARVIN: Yeah, that's what he testified to before.

Q. You had not seen these pages before, had you?

A. No.

Q. Let's get over to Exhibit 12, what your counsel has referred to as the matrix entitled, "Bay Area Architects." I'm

sorry. I want to instead refer to Exhibit 11 entitled, "Manager's ratings."

Now, I seem to recall that this is a document that you hadn't seen before, either; is that correct?

A. Correct.

Q. I'm going to ask you even with having it before you now to perhaps assist me in some interpretation of it, if you can.

If you'll look at, for example, Intergraph, he was what you're asking, are you asking whether if he did the math basically on this matrix and subtracted the M/WBE points from those vendors who were given those points what would the rankings be? Is that what you're asking him on this matrix?

MR. GARVIN: That's another way of putting it.

THE WITNESS: From a purely math perspective, Intergraph would have had a score of 47.4 and Bras would have had a score of 48. a .6 difference.

MR. BERG: You mean -- you mixed two answers. You said a .6 difference. I think your answer will read 48.6.

THE REPORTER: I got it.

MR. GARVIN: Q. I hate to go through this again, but there is some confusion.

A. Sure.

Q. Correct me if I'm wrong, I think what you're telling me is that if you eliminate M/WBE as a factor here and subtract 10 points from the scores of Intergraph, that Mr. Bras would mathematically rate higher at 48.0 versus Intergraph at 47.4.

Is that a fair statement.

MR. BERG: Mathematically?

MR. GARVIN: Yes.

THE WITNESS: Yes.

MR. GARVIN: Q. On that mathematical basis, then, one would conclude, would one not, that Mr. Bras would rank No. 3 as to the overall 13 architects set forth in this matrix?

MR. BERG: Before you answer that, could you read the question back to me, please?

(Record read.)

MR. BERG: It's argumentative as to form, but otherwise, you can answer.

THE WITNESS: Mathematically, yes.

MR. GARVIN: Q. Now, was there some determination made at some point that you would -- "you" meaning Pacific Bell -- would complete this process by selecting the top three architectural firms?

MR. BERG: It's vague as to time.

MR. GARVIN: I said at the completion of this process.

MR. BERG: I know, but if you read your question, you're going to see it's vague as to when the decision was made.

MR. GARVIN: Q. Whenever it was made, at the end of the process you made a decision, did you not?

A. At the end of the process, we made a decision.

Q. And in this case, the decision was to award contracts to the three top firms, architectural firms, "the three top," meaning the three who scored the highest in this study?

A. No.

Q. What was your decision?

A. The decision was to engage the top three for a negotiation.

Q. I see. And had M/WBE -- strike that.

When you say "top three," you mean reduced the number from 13 to 3?

A. The -- well, the top three firms, Garcia/Wagner, Intergraph and Roja, they were subject of further review and negotiation because potentially, we may not have reached an agreement to go any further.

Q. I understand this is kind of a preliminary screening?

A. Correct. It was just a guide for us to go through successive steps.

Q. Now, getting back to Mr. Bras, had the M/WBE status been eliminated as a factor, he would have been or survived that preliminary screening and been within one of the three firms.

Is that a correct conclusion?

A. No, that is not a correct conclusion.

Q. Where am I wrong?

A. The way we look at it is we put emphasis on expense of central office work and also administrative work and one of the objectives would have been for us to ensure that we had more than one firm that could deliver these type of services.

On this particular scenario that you described, had Mr. Bras been the third firm, we would have been in a very awkward position of not having an architectural -- not having more than one architectural firm that was proficient on the administrative space design experience. And then there are other factors, as well.

Q. Let's take them one at a time, then.

Are you telling me that you would have some difficulty because Mr. Bras did not have the administrative design experience?

A. With Pacific?

Q. With Pacific. At least sufficient for your purposes?

A. Based on the ratings provided by the project field people.

Q. And I think you said that you'd only be left with one firm with that kind of experience had Bras been in that top three?

A. Correct.

Q. And what firm would that have been?

A. That was Garcia/Wagner.

Q. And with Intergraph, in fact, being within the top three, can you consider, "you" being Pacific Bell, that Intergraph had sufficient administrative design experience to satisfy your needs?

A. Based on the rating provided by the field people, yes.

Q. I take it by this rating in Exhibit 11, the matrix, Roja even had less administrative design experience than Mr. Bras?

MR. BERG: Excuse me. You misstated. I think you're talking about Exhibit 12.

Mr. GARVIN: I'm sorry. Exhibit 12. Did I say 11?

MR. BERG: Yes.

MR. GARVIN: Change that to 12.

MR. BERG: Now, can I hear the question again? What was the question, unless you want to say it again.

MR. GARVIN: I can say it again.

Q. Referring to Exhibit 12, as to the attribute of administrative design experience, you would conclude that Mr. Roja or the Roja firm even had less administrative design experience of Mr. Bras.

Is that a correct conclusion?

A. Based on the ratings, he received a 1 and Bras received 4.

Q. So was this data set forth in Exhibit 12 the only data on which you, Pacific Bell, relied on in making the preliminary cut, so to speak?

MR. BERG: Vague and ambiguous as to the word "preliminary cut."

MR. GARVIN: Q. I mean a cut from 13 to 3, which I was told was a preliminary matter.

A. Based on the analysis of the data, yes.

Q. Data set forth in 12, Exhibit 12?

A. Yes.

Q. Now, you'll notice referring to Exhibit 12 the top three firms mathematically speaking?

A. We did not pick the top three exclusively based on the mathematics. In other words, I look at the top three to ensure that the top three would provide the balance capabilities that we needed.

Q. And did you make that determination?

A. Yes, I did.

Q. So as it so happens in this case, mathematically the top three firms mathematically just happened to look good to you on balance after looking over the whole process?

MR. BERG: Objection. Argumentative as to form.

MR. GARVIN: Q. Is that true?

A. When I looked at the results, the top three firms appear to have a well balance of the capabilities we were looking for so that basically allowed us to then go to the next stop of beginning the dialogue on association with them.

Q. When you talk about the -- what did you call it, the qualities you were looking for --

Q. The capabilities.

Q. -- the capabilities you were looking for?

A. Right.

Q. Can you spell out these capabilities? In other words, are they spelled out here in the matrix or were there some other capabilities you were looking for other than what was considered in these attributes?

A. Primarily they are the attributes that are stated in the matrix, however, primarily that's what it is.

Q. Then you went on into negotiating or you had -- why don't you tell me what happened after that.

A. Well, this was a guide for this stage of the process. This would eventually identify certain ranking. We would analyze it, then we would decide who are the three firms, engage in further dialogue and provide us with additional data. they would have to review our contracts because we also change our contracts and so there was quite a bit of involvement that would take place subsequent to this and if, let's say, one of the firms would not prevail, we would have then gone back to the list, taken the next one and successive negotiation and eventually we could have arrived at a list of three.

Q. When you say you would take the next one, you mean the next one that scored highest mathematically?

A. The next one in a balanced way would compliment the ones that we had.

Q. I thought I saw a document of that process that occurred afterwards.

A. Sure. I --

Q. I guess what I'm looking for was there a letter that went to Garcia, Roja and Intergraph after this preliminary process ended, a letter inviting them

[END]

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's own motion to revise General Order 156.	FILED PUBLIC UTILITIES COMMISSION SEPTEMBER 17, 1993 SAN FRANCISCO OFFICE R.93-09-026

ORDER INSTITUTING RULEMAKING

This Order Instituting Rulemaking (OIR) is being issued to consider revising General Order (GO) 156. GO 156 implements Public Utilities (PU) Code §§ 8281-8286, which mandates that the Commission require that those utilities with gross annual revenues exceeding $25 million, and their Commission-regulated subsidiaries and affiliates, seek to increase their procurement from women, minority, and service disabled veteran-owned business enterprises (WMDVBEs). Among other things, GO 156 sets goals of purchasing 20% of the products and services used by the utilities from WMDVBEs by the end of 1993 (15% for minority-owned business enterprises and 5% for women-owned business enterprises). GO 156 § 8.2.1,

adopted by Decision (D.) 93-06-041, provides that numerical goals for DVBEs will become effective in 1997.

GO 156 has been amended several times since 1988 when it was adopted by D.88-04-057. Certain of these amendments were made pursuant to various petitions for modification of D.88-04-057 in Rulemaking (R.) 87-02-026, while others were the product of three petitions for modification filed in R.91-02-011.

On May 26, 1993, the Commission convened a Full Panel Hearing (FPH) to inquire into the status of the WMDVBE program established under GO 156. We invited participants to address a number of issues with implications for the existing GO 156 program. Subsequently, in D.93-07-057, we stated that a new proceeding would be opened to address the issues explored at the FPH. In D.93-07-057 we also determined that a limited role remained for R.87-02-026 and that R.91-02-011 should be closed.

At the time that D.93-07-036 issued, one unresolved matter remained in R.87.02-026 and two in R.92-02-011. The sole issue pending in R.87-02-026 is the subject of two petitions for modification of D.90-12-027, filed by The Coalition to Help Advance Natural Gas and Energy Suppliers (CHANGES). The petitions seek elimination of the optional federal offshore and Canadian natural gas fuel exclusions authorized by GO 156 5§ 8.5 and 8.10.4.

We ordered that R.87-02-026 should be closed once the CHANGES petitions are resolved. Recently, on September

14, 1993, CHANGES filed a motion to dismiss its petitions; however, on the same day, Pacific Gas and Electric Company (PG&E) filed a petition for modification of D.92-12-027. PG&E's petition seeks the elimination of the Canadian natural gas fuel exclusion but not until November 1, 1994. These pleadings will be reviewed in R.87-02-026 and resolved in due course.

We also ordered that the two issues unresolved in R.91-02-011, GO 156 verification standards and scheduling of a proceeding for routine consideration of WMDVBE issues, be deferred to this new OIR where they may be considered in a fuller and more current context. We have included these issues in the questions posed in this OIR.

An OIR is the correct forum to make a decision on the revision of the existing GO. This OIR lists questions that are fundamental to our consideration of any revision of the existing rule. The utilities subject to GO 156 are made respondents and will be required to file answers to the questions set forth in this OIR. Other interested persons and entities are invited, but not obligated, to file answers to any or all of these questions. We desire to obtain the benefit of broad input and will direct the Executive Director to mail this OIR to those persons and entities who have indicated an interest in participating in further refinement of GO 156, including those who participated in, and/or submitted comments on, the FPH we held May 26, 1993.

Once we have received comments, we will assess them and order workshops, alternative dispute resolution processes and/or evidentiary hearings, as appropriate, to resolve contested issues before any revisions to GO 156 are proposed. Any changes ultimately proposed will be mailed for comment to all on the service list established in accordance with this proceeding before we make a final decision.

In the following sections, we briefly summarize the broad areas we intend to focus on in this OIR and then list the specific questions we wish answered.

I. AB 486

Assembly Bill (AB) 486, which became effective January 1, 1993, amended the California Public Contract Code to create a new framework for the certification of women, minority, and disadvantaged business enterprises by state and local agencies. Although AB 486 does not apply to utilities, it has caused us to reevaluate our policies and procedures for verification of WMBEs seeking to do business with utilities.[1] At present, the California Department of Transportation (CalTrans) and a number of other state and local agencies have procedures for verifying the minority or woman-owned status of business enterprises. AB 486 requires each state agency which performs verifications to accept verifications

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[1] DVBEs are verified by the State Office of Small and Minority Business and not by the GO 156 Clearinghouse.

performed by other agencies which use certain federal Small Business Administration verification standards. AB 486 also requires CalTrans to maintain a WMBE data base which is available to other agencies and the public.

Our WMBE program uses minority definitions and verification standards and procedures which are different than those in AB 486.2 A number of utilities have recommended that we replace the GO 156 minority definition and our verification standards with those in AB 486, and that we require utilities to accept verifications from any agency using the AB 486 standards. This recommendation raises the following questions:

A. Policy Considerations

1. Should the Commission be concerned that the use of the basic AB 486 verification standards by different agencies may result in differing conclusions regarding the eligibility of specific firms for participation in WMDVBE programs? If so, what specific steps could be taken to resolve this concern?

2. Should the Commission be concerned that the incorporation of AB 486 verification standards and procedures into the Commission's GO 156 program would, at

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[2] The Commission's minority definitions and the outline of its verification program is set forth in GO 156. The verification standards used by the GO 156 Clearinghouse operator under contract with the Commission are set forth in appendices to that contract.

least in the short term, reduce the standardization achieved by the Commission's current verification process?

3. Would incorporation of AB 486 verification standards tend to increase or reduce the possibility that "fronts" would be verified as WMBEs?

4. One of the criticisms of the current GO 156 verification process is that it is essentially duplicative of other, existing governmental certification programs. Some suppliers argue that it is time-consuming and costly to seek verification from multiple agencies.

a. If the Commission decides to adopt an AB 486 definition of "minority" and the AB 486 verification standards and procedures, is there any reason why the Commission should maintain a separate clearinghouse to verify businesses wishing to contract with utilities?

b. Is there any evidence that other agencies which verify WMBEs might be unwilling to perform verification analyses of businesses seeking to provide highly specialized products or services to utilities?

c. How likely is it that a business enterprise seeking to do business with utilities would, in the absence of the GO 156 Clearinghouse, be unable to locate an agency willing to perform a verification analysis?

d. If AB 486 is incorporated in the GO 156 program, would the benefits of a separate utility-specific Clearinghouse outweigh its cost?

e. If you believe a separate utility-specific Clearinghouse should be maintained, how should it be funded?

B. Technical Issues To Be Considered If The Commission Retains The GO 156 Clearinghouse And Incorporates Elements Of AB 486 Into GO 156.

1. Both of the AB 486 definitions of "minority' cited, respectively, in Public Contracts Code §§ 2051(c) and 10115.1(d), include within the definitions "any other group of natural persons identified as minorities in the respective project specifications of an awarding department or participating local agency." Would the adoption of such an open-ended definition make it difficult for the Commission or the utilities to administer GO 156?

2. If the Commission were to adopt an AB 486 approach for utility procurement programs, how would the verification criteria currently used by the GO 156 Clearinghouse have to be changed?

C. Technical Issues To Be Considered If The Commission Retains The GO 156 Clearinghouse And Does Not Incorporate Benefits of AB 486.

1. Should the minority definitions in GO 156 be amended? Some have expressed the opinion that the GO 156 § 1.3.8 definition of Asian Pacific Americans is ambiguous with regard to the status of those with origins in Iran, Iraq,

Lebanon, Afghanistan, and other countries not specifically listed.

2. Should GO 156 be amended to streamline the triennial reverification process required by GO 156 § 2.1.3? Could this be done without sacrificing verification quality?

II. GOALS

GO 156 § 8.2 currently requires each utility to establish initial minimum long term goals for each major category of products and services the utility purchases from outside suppliers. The established goals are not less than 15% for minority-owned business enterprises and not less than 5% for women-owned business enterprises.

GO 156 § 8.4 currently requires that utilities establish goals for minority women-owned business enterprises and non-minority women-owned business enterprises. These goals are to be a subset of the overall WMBE goals established under GO 156 § 8.2, and are intended to ensure that utilities do not direct their WMBE procurement efforts toward non-minority women and minority men-owned business enterprises to the detriment or exclusion of minority women-owned business enterprises.

In response to a question we posed in connection with the recent FPH, a number of utilities expressed the opinion that the current minimum goals should not be changed until after a study of the availability of minority and women-owned business enterprises. Most utilities also recommended that we

refrain from adopting specific goals for minority women until an availability study has been prepared.

Certain WMBE suppliers and advocates recommended that the goals be increased. Some suggested that the goals be based on WMBE availability, while others favored a more broad brush approach. Some recommended that we, ourselves, adopt a minimum goal for procurement from minority women-owned business enterprises.

GO 156 does not bar utilities from setting goals in excess of the initial minimum long term goals set forth in § 8.2. Indeed, GO 156 § 8.3 states that the specification of initial long term goals shall not prevent utilities from seeking parity with public agencies. (In PU Code § 8281 (b) (l) (B) the Legislature found that public agencies are awarding 30% or more of their contracts to WMBEs.) Therefore, WMBE suppliers and advocacy groups are already free to seek to persuade individual utilities to voluntarily increase their WMBE goals. Our approval is not necessary.

Before we could amend GO 156 to require utilities to set higher long term goals, we would need to establish on the record a rational basis for doing so. Obviously, detailed supplier availability studies such as those described in Croson[3] and its progeny could form the basis for new goals. We do not reject the possibility that other bases for new goals could also be presented.

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[3] City of Richmond v. J.A. Croson (1989) 488 U.S. 469.

A. Overall WMBE Goals

1. Are you aware of any current, statewide, regional, or local WMBE availability studies which have been prepared and could be reviewed in this proceeding?

a. If so, please either provide them as an attachment to your response to these questions or describe them in as much detail as possible. Please state whether you believe an evidentiary hearing is necessary for the presentation of such studies.

b. If not, please state whether you are aware of any studies currently underway, which may be available in the relatively near future.

2. If you believe that the GO 156 minimum long term goals should be changed, but are not aware of any availability studies currently completed or underway, what other evidence do you believe is available to justify new WMBE goals?

a. If such evidence is available in written form, please either attach the written material to your response to these questions, or describe the evidence in detail.

b. Please state whether you believe that an evidentiary hearing is necessary for the presentation of this evidence.

3. If you do not believe that the goals should be changed in the absence of current availability studies, and do not believe such statewide, regional, or local studies are

underway, please describe with as much clarity as possible the exact nature, scope, details, and estimated cost of the type of study you believe would be necessary to justify changing the goals in GO 156.

4. How would reliance on availability studies affect the scope of the goals? Would the goals have to apply only to minorities found to be available?

B. Minority Women Goals

1. Should the Commission itself adopt a separate goal for procurement from minority women-owned business enterprises?

a. If so, should the Commission wait to do so until a study of the availability of minority women-owned business enterprises has been performed?

b. If you believe the Commission should adopt a goal for minority women-owned businesses prior to the completion of an availability study, what specific goal do you recommend?

i. What evidence do you suggest the Commission rely on as the basis for the numerical goal?

ii. If you have no specific recommendation or do not have a specific evidentiary basis for your recommendation, what do you suggest the Commission rely on as a basis for a minority women business enterprise goal?

c. If you are a utility, what is the current goal for procurement from minority women-owned business

enterprises you established in compliance with GO 156 § 8.4?

i. What was the basis for this goal?

ii. How does your actual procurement from minority women-owned business enterprises compare with your goal?

2. If you do not believe the Commission should establish a goal for procurement from minority women-owned business enterprises, please explain whether you believe utilities are making adequate progress in increasing procurement from such business enterprises.

III. OUTREACH

During the FPH, several organizations and individuals proposed that we amend GO 156 to incorporate, at least informally, programs designed to provide WMDVBEs with various types of technical or economic assistance. These proposals included utility-WMDVBE partnerships, joint ventures, mentoring relationships, loan pools, insurance and bond arrangements, set-asides, and other technical and economic assistance.

GO 156 does not currently require or authorize utilities to engage in outreach programs which include utility-WMBE partnerships, joint ventures, mentoring, loan pools, insurance arrangements, pension, and bonding arrangements and/or other technical or economic assistance. (See GO 156 §§ 6.2 and 6.3.) Under current law, to the extent that we were to

mandate programs which favor WMBEs over non-minority-owned businesses, we might be susceptible to charges of discrimination against non-minorities unless we could demonstrate that the programs were narrowly tailored to remedy past discrimination. We have in the past noted that GO 156 does not include any set asides or bid preferences, and have censured a utility for excluding a business from a bidding opportunity solely on the basis of the race of the owners. (See Muse, Cordero, Chen, Inc. v. Pacific Bell (1990) 38 Cal.P.U.C. 5; Re Public Utilities Code Sections 8281 to 8285 Relating to Women and Minority Business Enterprises (1990) 38 Cal.P.U.C. 2d 384, 394.)

Thus far, the Commission has not conducted an availability study designed to meet the requirements of Croson and its progeny, although it has over the years developed a substantial body of evidence showing that minority and women-owned business enterprises have in the past received a share of utility contracts which is disproportionately low in relationship to their representation in the supplier community. Since GO 156 does not provide set asides or bid preferences, or preclude any race from bidding on any utility contract, no Croson study is necessary to support the Commission's current program. However, if the Commission were to adopt a program which permitted businesses owned by persons of certain racial origins to receive from utilities tangible financial or technical advantages not available to members of all races, under

current law it would need to establish the proper legal foundation for such a program (e.g., a Croson study).[4]

A. Policy Issues

We are interested in exploring whether there is a rational and lawful basis for amending GO 156 to require or authorize utilities to provide technical or economic assistance to WMDVBEs.

1. To what extent are the problems WMDVBEs face in doing or seeking to do business with utilities the same as the problems similarly situated non-minority businesses face in doing or seeking to do business with utilities? To what extent do WMDVBEs face problems not faced by similarly situated non-minority businesses? Please be as specific as possible.

2. What mechanisms are, or should be, in place to ensure that WMDVBEs with contracts with utilities are treated the same as other businesses providing similar products or services to those utilities?

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[4] State programs which provide benefits or limit opportunities based on race or national origin are subject to strict scrutiny, but are not entirely prohibited. (Croson, supra.) Such classifications may be permissible if they are narrowly tailored to meet a compelling interest such as remedying identified discrimination within the state's jurisdiction. (Id., 509.) A significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or its prime contractors, an inference of discriminatory exclusion could arise. (Id.)

3. Should the Commission amend GO 156 to require or authorize utilities to implement programs which provide WMDVBEs with technical and/or economic assistance not available to similarly situated non-minority businesses? If so:

a. What programs do you recommend?

b. Why do you recommend these programs?

c. Do you believe these programs should be required, or simply authorized?

d. How would you reconcile your recommendation with the requirements of Croson and similar judicial decisions?

4. Should such programs be available only to entities which are "disadvantaged" businesses enterprises, rather than all WMDVBEs?

5. Should the Commission amend GO 156 to require utilities to implement race-neutral technical and or economic assistance to all small and/or disadvantaged businesses seeking to do or doing business with utilities? If so:

a. What programs do you recommend?

b. Why do you recommend these programs?

c. Do you believe these programs should be required, or simply authorized?

B. Croson Study

A study regarding the contracting experience of WMDVBEs able to provide products or services to utilities in California could help us determine whether there is a lawful and rational basis for requiring or authorizing utilities to provide preferential technical or economic assistance to WMDVBEs. Such a study may also be helpful with regard to setting future WMDVBE goals. We are interested in exploring how such a study could be most effectively and expeditiously conducted.

a. Please describe with as much clarity as possible the exact nature, scope, elements, and estimated cost of the type of Croson study you believe would be necessary to justify requiring or authorizing utilities to provide preferential technical or economic assistance to WMDVBEs.

b. Are you aware of any statewide, regional, or local WMDVBE studies currently available, or soon to be available, which might supply information useful for a Croson review? If so, please either provide them as an attachment to your response or describe them in as much detail as possible.

IV. COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT

Although state law does not currently require us to add the class of disabled persons to our WMDVBE program, some participants at the FPH argued we should. We are

aware of the recently enacted Americans with Disabilities Act (42 USC §§ 12101-12213) and believe it is appropriate to consider including business enterprises owned by this class in GO 156. Consequently, please comment on the following:

1. Should the Commission amend GO 156 to include businesses owned and operated by Americans with disabilities, as defined in the Americans with Disabilities Act?

2. If so, should the Commission use GO 156 provisions regarding service disabled veteran businesses as a model?

3. More particularly, what provisions would be necessary in order to allow the Commission to effectively oversee and assist in the development of a utility program to encourage procurement from business enterprises owned by disabled persons?

4. If the WMDVBE program is expanded, in the absence of an initial numerical goal for procurement with business enterprises owned by disabled persons, should the Commission amend GO 156 §9 to require utilities to report more frequently than once a year on their progress in implementing the new program? Should such an amendment also apply to DVBEs?

V. ADDITIONAL ISSUES

A. Reporting Procurement from WMDVBE Brokers/Distributors

We recognize that GO 156 currently permits utilities to report 100% of the dollars paid to a WMDVBE even where the WMDVBE itself simply performs a brokerage or distribution function and receives only a commission or brokerage fee. Critics of our current approach claim that it does not accurately reflect the ultimate distribution of utility contract dollars between WMDVBEs and non-minority businesses. Section 23.47 of Part 23 of Title 49 of the Code of Federal Regulations (CFR) sets forth federal Department of Transportation regulations specifying that the percentage of contract dollars paid to a WBE, MBE, or disadvantaged business enterprise (DBE) which can be counted toward procurement goals varies with the nature of the business' operations. For example, 100% of expenditures for materials and supplies required under a contract and obtained from an WBE, MBE, or DBE manufacturer may be counted, but only 60% of expenditures with WBEs, MBEs, or DBEs which are regular dealers. (49 CFR § 23.47 (e) (l).)

Although the federal approach is somewhat more complex than the approach taken in GO 156, we are not aware that the federal Department of Transportation has had any trouble implementing § 23.47. Moreover, the adoption of a § 23.47 approach would also create greater consistency between the GO 156 program and the federal program.

1. Should the Commission adopt a reporting requirement similar to that in 49 CFR § 23.47? Please describe the benefits and/or burdens of such an approach.

2. Please also state whether you have participated in any contracts subject to these federal regulations, and, if so, briefly describe your experience.

B. Reporting Procurement From WMDVBE Utilities

Pursuant to GO 156 §8.9, utilities may exclude payments made to other utilities from the procurement base used to establish the goals and measure progress toward them.

1. Should GO 156 be amended to authorize utilities to count purchases from utilities which are themselves WMDVBEs (e.g. public utility providers of cellular telephone service) toward the overall procurement goals?

2. If so, could this be accomplished without eliminating the GO 156 § 8.9 option for utilities to exclude purchases from other utilities from their overall procurement base?

C. Reporting Procurement From WMDVBE Subcontractors

Certain utilities have proposed that utilities be allowed to record in their subcontracting results a percentage of purchases from prime contractors who claim to purchase a percentage of their own purchases from WMDVBE subcontractors, without proof that the subcontractors have

been verified by the GO 156 Clearinghouse. Other parties have suggested other modifications of the GO 156 subcontracting program.

1. Should the subcontracting provisions of GO 156 be amended to permit reporting subcontracts on a percent of purchase basis in appropriate circumstances?

2. If so, could a percent of purchase approach be reconciled with the GO 156 § 6.3.9 requirement that utilities only count subcontracts with WMBEs verified by the GO 156 Clearinghouse?

3. What impact would reliance on a Croson availability study as a basis for goals have on the utilities' ability to report subcontracts with out-of-state suppliers?

4. Do you have any other recommendations regarding the GO 156 subcontracting program?

D. Scheduling of Future, Routine WMDVBE Proceedings

D.93-07-057 deferred to this OIR the issue of what schedule we should impose for an annual, generic WMDVBE proceeding. This issue, which was posed but not addressed in R.91-02-011, stems from our determination, in D.89-08-026, that issues of utility program cost recovery should be removed from utility-specific general rate cases and addressed in an annual proceeding.

1. Does good reason still exist to establish a proceeding for generic review and authorization of routine funding of the utilities' internal WMDVBE program costs or should such review be returned to each utility's general rate case? Please discuss the implications of your answer for those telecommunications utilities subject to the New Regulatory Framework and those telecommunications and energy utilities which are not.

2. Should GO 156 be amended to establish the applicable proceeding for review and authorization of the utilities' internal program costs?

VI. CONCLUSION

We have reviewed the transcript of the FPH and the comments submitted and have attempted to-compile a comprehensive, yet manageable, list of questions. To the extent interested parties believe we have failed to adequately address an issue or have not identified it at all, we welcome focused discussion of that issue. Comments shall be filed in this docket 60 days from the date we issue this OIR and reply comments shall be filed 30 days after the-initial comments.

IT IS ORDERED that:

1. A rulemaking proceeding on the Commission's own motion is instituted to solicit comments and recommendations on a proposed revision to the Commission's General Order **(GO) 156.**

2. All utilities subject to GO 156 are made respondents in this proceeding. All respondents are required, and interested parties are invited, to respond to the questions listed above and, in general, to the subject matter of this proceeding.

3. An original and 12 copies of all comments shall be filed as a pleading with the Commission's Docket Office at 505 Van Ness Avenue, Room 2001, San Francisco, California 94102, within 60 days of the issuance of this order. Two additional copies shall be mailed to the Women, Minority and Service Disabled Veteran Business Enterprise Program Staff of the Commission's Executive Division. Within 30 days of the date comments are due, the Commission's Process Office shall compile and serve a service list which includes the names and addresses of all parties who have filed comments. Each commenting party is required to serve its comments on other parties upon request. Reply comments shall be filed in the same manner as initial comments and shall be due 30 days after initial comments are filed.

4. If, after reviewing the initial comments filed in this rulemaking, the Commission determines that workshops, evidentiary hearings, or alternative dispute resolution proceedings are necessary to resolve contested issues or clarify issues under consideration, such proceedings will be scheduled by the Commission's Administrative Law Judge Division and/or the Women, Minority, and Service Disabled

Veteran Business Enterprise Program Staff of the Commission's Executive Division.

5. The Executive Director is directed to mail a copy of this order to all utilities subject to GO 156; to those on the master service list for Investigation 90-02-044, Rulemaking 87-02-026, and Rulemaking 91-02-011; to State government agencies responsible for developing and maintaining data bases of verified or certified Women, Minority, and Service Disabled Veteran Business Enterprises; and to all persons who participated at the Full Panel Hearing we held on May 26, 1993 or submitted written pre- or post-hearing comments.

This order is effective today.

Dated September 17, 1993, at San Francisco, California.

DANIEL Wm. FESSLER
President
PATRICIA M. ECKERT
NORMAN D. SHUMWAY
P. GREGORY CONLON
Commissioners

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's own motion to revise General Order 156.	R.93-09-026 (Filed September 17, 1993)

INTERIM OPINION

On September 17, 1993, the Commission issued an Order Instituting Rulemaking (OIR) in this docket to consider revising General Order (GO) 156 to better address issues related to Women/Minority/Disabled Veterans Business Enterprises (WMDVBE) in light of experience gained in the administration of this program over the years.

In the OIR, we set forth a number of questions concerning such diverse matters as the application of Assembly Bill (AB) 486, continued maintenance of a utility-specific clearinghouse, goals, outreach, compliance with the Americans with Disabilities Act (42 U.S.C. Sections 12101-12213), reporting procurement results, and scheduling of future routine WMDVBE proceedings. We solicited

responses and comments on those questions from a broadbased group of utilities, women-owned and operated businesses, minority business enterprises, disabled veterans and veterans organizations, governmental agencies, and others having interest this subject. Response to the OIR was very encouraging, and a number of comments and reply comments, as well as suggestions, were received.

Review of the responses received demonstrates a clear need for the Commission to make certain policy determinations before we may proceed further toward the resolution of many of the issues raised in this proceeding. The policy determinations which. we today adopt and which are set forth below, are supported by the record, and, we feel, are necessary to the continued viability of the WMDVBE program.

AB 486 and Related Clearinghouse Issues

In 1988, legislation was enacted to create a program to provide women and minority owned businesses with an opportunity to compete in utilities' procurement of goods and services. In order to comply with this mandate and to ensure that utilities were doing business with bona fide women and minority business enterprises (WMBEs), a clearinghouse was established for the purpose of verifying the status of vendors claiming women or minority status.[5] Currently, the

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[5] In 1991, the Legislature added Disabled Veterans Business Enterprises (DVBEs) to the WMBE program. However, because the Department of General Services, Office of Small and Minority Business has been

Commission contracts with an independent commercial firm, Cordoba Corporation, to operate our clearinghouse.

Over the years, other governmental agencies have created similar programs designed and intended to ensure that vendors who apply to do business with them have bona fide women and minority owners. In response to this proliferation of potentially redundant programs, the Legislature enacted Assembly Bill (AB) 486, effective January 1, 1993, specifically to effect "one-stop shopping" with uniform, reciprocal, integrated standards to govern procurement by state agencies from WMBE vendors.[6]

In the OIR we asked the question whether it made sense that WMBEs should face different verification/certification requirements depending upon whether they were contracting with state agencies or public utilities. After a review of comments received, we are compelled to answer that question in the negative. The comments collectively indicate that there i8 no good reason to believe that the use of AB 486 criteria by various state agencies will result in significantly different determinations of WMBE eligibility by those agencies; rather, the comments uniformly assert that standardization of verification will be increased, not reduced.

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delegated the task of certifying vendors who fall within this category, DVBEs are not certified by the clearinghouse.

[6] AB 486 amends 5§ 2050 et seq of the Public Contract Code (Pub Contract Code).

Likewise, most comments argue, the commission's WMBE program would not be weakened by adoption of AB 486 certification ; criteria and accordingly, the majority support replacing the GO 156 verification standards with the certification provisions of AB 486. The majority of commentators are of the view that-from both a practical and financial point of view, the standards by which WMBE status is determined and verified should, to the maximum extent possible, be universal for all programs sponsored-or administered r by California's state agencies.

We are persuaded that uniformity of certification/ verification standards has merit and we wish to conform GO 156 with the requirements of AB 486. However, before we can devise appropriate modifications to § 2 of the GO (which governs verification) we must consider a related question-posed in the OIR--whether a utility-specific clearinghouse should be maintained under the GO 156 program?

Specifically, we asked whether the maintenance of a : utility-specific clearinghouse is duplicative of other governmental certification programs and is excessively time consuming and costly. The comments which respond to this question are not unanimous. For example, of the seven large utilities, some (Southern California Edison Company (Edison), San Diego Gas & Electric Company (SDG&E)) favor-abandonment of the clearinghouse; ; others (AT&T Communications of California (AT&T), GTE California Incorporated, Pacific Gas and Electric Company, Southern

California Gas Company) support retention of a "streamlined" version (which they do not define); and one other utility (Pacific Bell) suggests that the matter should be "researched".[7]

One potential solution to this uncertainty may be found in AB 486, itself. AB 486 specifically recognizes the California Department of Transportation (Caltrans) as the agency responsible for establishing and administering a computerized databank of certified WMBEs (Pub Contract Code § 2056) and provides that the certification criteria utilized by Caltrans are the same as those found under Part 23 of Title 49 of the Code of Federal Regulations (Pub Contract Code § 2052(a)).

A logical extension of the move toward "one-stop shopping," with its concomitant aims of reducing duplicative, overlapping governmental functions and eliminating the associated, unnecessary expenditure of time and capital by the private sector, suggests that we explore whether the GO 156 program might use the Caltrans databank as the central database of certified WMBEs.

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[7] The comments of those utilities which oppose retention of the clearinghouse are forceful. SDG&E, lists seven perceived benefits and stresses the reduction in cost and greater convenience for all concerned. (Comments, pp. 2-3.) Edison states, "The products or services Edison procures from its vendors are generally not specialized or customized for utilities, but are the same sorts of products and services which are contracted for by state agencies" and concludes, "Edison does not believe there is a need for a separate utility-specific clearinghouse." (Comments, pp. A-3 A-4.)

We see another potential benefit of using the Caltrans database. Not mentioned in the OIR, but relevant to this discussion, is Senate Bill (SB) 551, recently added to the Public Utilities (PU) Code as § 324.5. The statute requires the Commission to publish its WMBE database both electronically and in hardcopy form. This mandate dovetails with AB 486, which requires that the Commission make publicly available in limited form any database it uses for its own procurement (such as the clearinghouse database). These dual publication requirements could be met easily, at greatly reduced expense,-were we to adopt the Caltrans databank for our WMBE program and for our own procurement needs. Under such circumstances, we could comply with both statutes through use of the "Disadvantaged Business Enterprises Electronic Information Bulletin Board Service" (DBE/BBS), also known as "Calcert." This service allows anyone who has access to ascertain the status of a vendor, or obtain a listing, by Standard Industrial Classification type codes. Caltrans' DBE/BBS is presently in operation and free of charge.

In light of all the foregoing, we will direct that our WMDVBE program staff conduct a study to determine the comparability of the Caltrans program to our GO 156 program-and the feasibility of using the Caltrans databank as our program moves forward.

Among the issues we wish staff to investigate are both the initial and ongoing certification procedures used by Caltrans, including timeliness of processing, and the relative

ease by which the end-user may obtain information about potential vendors (we want to know how "user friendly" the Caltrans databank is compared to the existing clearinghouse database). Staff should also investigate how we would accomplish a transfer of the clearinghouse database to Caltrans, should we ultimately determine to pursue this course of action.

We direct that the report be filed in this docket within 60 days of the effective date of this order. We will not require staff to serve the report on the extensive service list; instead we will direct staff to serve only the respondent investor-owned utilities and all other parties which specifically request a copy of the report. Requests shall be made directly to Philip H. Bremond, the Manager of the Commission's WMDVBE program, Room 2006, within 45 days of the effective date of this order.

As noted in footnote 1 hereto, the task of verifying the status of Disabled Veteran Business Enterprises (DVBEs) has been delegated to the Department of General Services, Office of Small and Minority Business. The standards and guidelines established by that Office will continue to be utilized by the Commission and the utilities as verification of the status of DVBEs and no change is intended by this order.

Goals

In the OIR we asked a number of questions designed to elicit respondents' views about whether the GO 156 goals for utility procurement with WMBEs should be increased, and if

yes, how. Existing goals encourage procurement levels of at least 15% from minority owned businesses and at least 5% from women owned businesses. Individual goals for DVBEs have yet to be established.[8] We noted that:

> "GO 156 does not bar utilities from setting goals in excess of the initial minimum long term goals set forth in § 8.2. Indeed, GO 156 § 8.3 states that the specification of initial long term goals shall not prevent utilities from seeking parity with public agencies."
> (R.93-09-026 at p. 6.)

We also cited the legislative finding, contained within PU Code § 8281 (b)(l)(B), that public agencies' awards to WMDVBEs were as high as 30% of all contracts awarded by such agencies. Further, we reminded all parties that our approval is not necessary for the utilities to voluntarily increase their WMBE goals.

Regrettably, the comments do not signal unanimous utility | inclination to move beyond legislatively urged performance. Among the seven largest utilities, all but

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[8] Pursuant to Decision (D.) 93-06-041, which adopted an-all party settlement, utility procurement with DVBEs should increase on a good faith, best efforts basis through 1997, when (yet unestablished) numerical goals are to be identified. For this reason, our OIR does not raise as an issue the subject of DVBE goals. No party should infer from this "silence" that we are not committed to seeing DVBE procurement evolve, in the very near term, into a successful part of the overall GO 156 program.

Edison and AT&T recommend an availability study before any changes are made to the present goals. Many of the proponents of such a study mention, approvingly, that SB 718, enacted in 1991, requested the University of California to conduct a statewide availability study and that t the Final Report of the Assembly Commission on Emerging Business Enterprise Procurement recently added its endorsement to such a plan.[9] What these commentators fail to acknowledge, however, is that funding for such a study would be costly and no monies have been authorized by the legislature.

Edison rejects an availability study on several grounds, asserting that it is both unnecessary for a goal-based program such as the GO 156 program and "generally they do not have sufficient value to warrant performing them." (Comments, p. A-8.) -AT&T also discourages us from pursuing an availability study. (Comments, p. 9.)

Public Advocates, Inc. (Public Advocates), on behalf of a consortium of minority business entities, makes the same points though in much greater detail. (See generally, Reply Comments.) Public Advocates distinguishes the GO 156

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[9] The Assembly Commission on Emerging Business Enterprise Procurement (EBE Commission) was established in January 1992 by Assembly Resolution 30. Its directive was to review the experience of Emerging Business Enterprises (EBEs) in the procurement processes of state government and the state's public utilities. Members of the EBE Commission included leaders in state government, banking, private business and the public utilities. (Assembly Commission on Emerging Business Enterprise Procurement, Final Report March 1993, p. 1.)

program from those based upon government mandated set-asides or quotas and argues that consequently, City of Richmond v. J.A. Croson (1989) 488 U.S. 468, is-inapplicable here. According to Public Advocates, by urging no change unless an availability study is in hand:

> "utilities have suggested tactics that could inadvertently delay future achievements by three to ten years, thereby adversely affecting future California job development, economic development and competition that could enhance the efficiency of utilities and result in lower rates to ratepayers." (Reply Comments, p. 1.)

We are persuaded by the quality of the comments which argue against performance of an availability study rather than the quantity of the comments which would have us order one before we consider any increase in existing goals. Where, however, do we go from here?

Edison, alone among utility respondents, indicates a willingness to raise its goals. Edison states:

> "Evidence which would justify increased WMDVBE goals is the existence of the 20% goals for the past three years and the successful attainment of those goals. During the same period the number of new businesses has increased substantially. Edison therefore

> believes that satisfaction of increased goals (other than for fuel) would not be difficult." (Comments, p. A-9.)

We find this assessment compelling. We urge utility managements to rethink their reluctance to voluntarily explore the ability of their respective companies to increase WMDVBE procurement.; Each utility, which upon-further reflection, determines it will undertake a good faith effort to increase WMDVBE procurement, is invited to file and serve comments stating that intent in this docket within 30 days of the effective date of this order. We will monitor responses and further review this matter, as necessary.

With respect to goals for procurement from businesses owned by minority women, we note that while individual goals are not contained in GO 156; utilities are currently required to establish and report, separately, goals for both minority and non-minority women. (GO 156, § 8.4.) Any expansion of goals, generally, should take into account the possibilities for increased procurement from these two groups.

Technical and Economic Assistance

In general, the utilities support provision of technical and economic assistance to WMDVBEs on a voluntary basis and/or urge that a Croson study (as opposed to an availability study) be done before assistance is mandated. We are persuaded, after review of the comments, that mandating technical/economic assistance on the basis of race or ethnic

origin would invite attach on constitutional grounds. Therefore, we find it prudent to direct that technical and economic assistance offered by any-utility as part of its outreach effort should be offered only on a voluntary basis and only in a race-neutral manner, unless it is offered in reliance upon a Croson study which finds such a remedy necessary.

Inclusion of Disabled-owned Business Enterprises in the GO 156 Program

The Americans with Disabilities Act (ADA) is designed to protect qualified individuals from employment discrimination. Under the ADA, an individual with a disability is defined as a person who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.

The issue before the Commission is not whether the GO 156 program should comply with the ADA, which is designed to address employment discrimination, but rather, whether disabled-owned business enterprises should be added to the current WMDVBE program.

It is clear that disabled-owned business enterprises are distinguishable from the DVBEs which the legislature added to our existing program in recognition of the sacrifice made by veterans disabled in military service to this country. However, though we are not without genuine sympathy for the difficulties experienced by disabled persons, we must

recognize that the legislature has not as yet found that disabled owners of businesses, like WMBEs, "have traditionally received less than a proportionate share of regulated public utility procurement contracts." (PU Code § 8281(b)(1)(C).) Absent such a legislative determination and the direction to us to expand the GO 156 program, we will not impose the additional costs associated with doing so upon utility ratepayers.

Additional Issues

Based upon the comments received, we find that other issues raised in the OIR, including but not limited to the reporting of procurement results and the scheduling of future, routine WMDVBE proceedings, require further consideration by the parties. Disposition of these additional issues may or may not be suited to evidentiary hearings or various methods of alternative dispute resolution, including workshops. We will direct the assigned administrative law judge to set a prehearing conference within the next 60 days at which the parties shall be prepared to discuss their preferred means of resolving outstanding issues in this OIR.

Findings of Fact

1. This rulemaking proceeding was instituted to determine whether GO 156 should be revised to better address issues related to WMDVBEs in light of experience gained in the administration of this program over the years.

2. Comments received in response to issues specified in the OIR have demonstrated a clear need for the Commission to make certain policy determinations before the Commission may proceed with resolution of issues raised in the OIR.

3. In response to legislation directing creation of a program to provide women and minority owned businesses with an opportunity to participate in utility procurement, the commission established a clearinghouse for the purpose of verifying the status of vendors claiming women or minority owned status.

4. The clearinghouse is currently operated by the Cordoba Corporation.

5. Over the years, other governmental agencies have created similar programs designed to ensure that vendors who apply to do business with them have bona fide women or minority ownership.

6. In response to the proliferation of such status verification programs, the Legislature enacted AB 486, effective January 1, 1993, specifically to effect "one-stop shopping" with uniform, reciprocal, integrated standards to govern procurement by state agencies from WMBEs.

7. In light of the enactment of AB 486, the OIR sought information as to whether WMBEs should face different verification/certification standards depending upon whether they were contracting with state agencies or public

utilities and whether a utility-specific clearinghouse should be maintained under the GO 156 program.

8. The majority of those filing comments support replacing the GO 156 verification standards with the certification procedures of AB 486.

9. The comments are not unanimous as to whether the -Commission should maintain a separate utility-specific clearinghouse; among the seven large utilities, two favor abandonment of the clearinghouse, four support retention of a "streamlined" version, and one utility suggests that the matter should be "researched."

10. AB 486 specifically recognizes Caltrans as the agency ; responsible for establishing and administering computerized databank of certified WMBEs and provides that the certification criteria utilized by Caltrans are the same as those found under Part 23 of Title 49 of the Code of Federal Regulations.

11. Existing goals encourage procurement levels of at least 15% from minority owned businesses and-at least 5% from women owned businesses; individual goals for DVBEs have yet to be established.

12. The legislature has found that the specification of initial long term procurement goals shall not prevent utilities from seeking parity with public agencies' awards of as much as 30% of all contracts to WMDVBEs.

13. In the OIR the Commission reminded parties that Commission approval is not necessary for the utilities to voluntarily increase their WMBE goals.

14. The comments do not signal unanimous utility inclination to move beyond legislatively urged performance; one utility states increases in WMDVBE procurement are justifiable and would not be difficult.

15. The legislature has not authorized funding for the statewide availability study approved in SB 718.

16. The utilities generally support provision of technical and economic assistance to WMDVBEs on a voluntary basis and argue that no mandatory assistance be required until a Croson study has been completed.

17. The OIR asks not whether the GO 156 program should comply with the ADA, but rather, whether disabled-owned business enterprises should be added to the current WMDVBE program.

Conclusions of Law

1. The Commission should adopt the certification criteria of AB 486 for use in our WMDVBE program and should revise GO 156 § 2 to accomplish this end.

2. Before the Commission can devise appropriate modifications to GO 156 § 2, it must determine whether there is good reason to continue to maintain a utility-specific clearinghouse.

3. Maintenance of a separate WMBE clearinghouse for use by the utilities and the Commission may no longer be justified.

4. Verification of DVBEs covered by GO 156 has been delegated to the Department of General Services, Office of Small and Minority Business, and the standards and guidelines established by that office should continue to be utilized by the Commission and the utilities for verification of the status of DVBEs.

5. A logical extension of the move toward "one-stop shopping" for WMBE certification with its concomitant aims of reducing duplicative, overlapping governmental functions and eliminating the associated, unnecessary expenditure of time and capital by the private sector, suggests the Commission explore whether the GO 156 program might use the Caltrans databank as the central database of certified WMBEs.

6. The Commission's WMDVBE staff should conduct 4 study to determine the comparability of the Caltrans program to our GO 156 program and the feasibility of using the Caltrans databank in that program and file that report in this docket within 60 days of the date of this order.

7. Though goals for procurement with DVBEs will not be established until 1997, the Commission is committed to seeing DVBE procurement evolve, in the very near term, into a successful part of the overall GO 156 program.

8. Strong legal arguments support the contention that the GO 156 program goals may be increased without first performing-an l availability study.

9. Utilities which determine they will undertake a good faith effort to increase WMDVBE procurement should file and serve a statement of intent in this docket within 30 days of the date of this order.

10. Mandating technical and economic assistance on a non-race neutral basis could invite attack on constitutional grounds.

11. Utilities which offer technical and economic assistance as part of its outreach effort should be offered only on a t voluntary basis and only in a race-neutral manner, unless it-is offered in reliance upon a Croson study which finds such a remedy necessary.

12. The ADA is designed to protect qualified individuals from employment discrimination.

13. Absent a legislative determination that disabled owners of business should be included in the GO 156 program, we will not impose upon ratepayers the additional costs associated with expanding the program.

INTERIM ORDER

IT IS ORDERED that:

1. Within 60-days of the effective date of this order, Commission staff shall conduct a study to determine the

comparability of the California Department of Transportation (Caltrans) program to the Commission's General Order (GO) 156 program and the feasibility of using the Caltrans databank in that program and shall address all specific issues we have raised in the text of this order. Commission staff shall file that report in this docket and shall serve the report on all respondent utilities and all other parties who, within 45 days of the effective date of this decision, submit a request for a copy with Philip H. Bremond, Manager of the Women/Minority/Disabled Veterans Business Enterprises (WMDVBE) program, Room 2006, State Building, 505 Van Ness Avenue, San Francisco, California 94102.

2. Within 30 days of the effective date of this order, utilities which determine they will undertake a good faith effort to increase WMDVBE procurement shall file and serve comments stating their-intent in this docket.

3. Pending further order of the Commission, utilities are encouraged to provide, as part of their individual WMDVBE outreach programs, technical and economic assistance on a voluntary, race-neutral basis

4. Within 60 days of the effective date of this order, the assigned administrative law judge shall set a prehearing conference at which the parties shall be prepared to discuss their preferred ; means of resolving outstanding issues in this rulemaking proceeding.

This order is effective today.

Dated August 3, 1994, at San Francisco, California.

DANIEL Wm. FESSLER
President
PATRICIA M. ECKERT
NORMAN D. SHUMWAY
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
Commissioners